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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1966.

NO. 659

STATE OF WISCONSIN,

Petitioner,

vs.

MILWAUKEE BRAVES, INC., *et al.*,

Respondents.

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

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The State of Illinois, by William G. Clark, Attorney General of Illinois, respectfully submits its brief in support of the Petition for a Writ of Certiorari as *amicus curiae.*

INTEREST OF THE STATE OF ILLINOIS AS AMICUS CURIAE.

In 1965, Illinois adopted a new anti-trust act modeled in many respects after the existing federal laws. Prior to

this time the state laws regulating business were antiquated and an effective state anti-trust policy was not attainable. Since the enactment of the new legislation, Illinois has attempted to vigorously assert its new act against local violations of well recognized anti-trust policies. At the threshold, however, Illinois is confronted with the recent decision of the Wisconsin Supreme Court here in issue, which if allowed to stand unmodified may seriously impede its attempt to enforce a state anti-trust policy which will complement federal anti-trust policy* and extend it to otherwise unreachable areas.

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* The Illinois Statute expressly provides that federal anti-trust decisions where applicable are to be deemed controlling precedents for its interpretation. Ill. Rev. Stat. 1965, ch. 38, § 60-11.

ARGUMENT.

The decision of the Wisconsin Supreme Court is predicated on a finding that the withdrawal of the Milwaukee Braves, Inc. from Milwaukee, Wisconsin, to Atlanta, Georgia involved a violation of the anti-trust laws of Wisconsin. The court, however, held that the state anti-trust laws could not be applied on two alternative grounds:

1) The decisions of this Court which have not been altered by Congressional action establish a national policy binding upon the States that the business of baseball is to be exempt from anti-trust regulation.

2) Baseball is an area of interstate commerce that demands uniform regulation to the degree that state regulation is prohibited by the Commerce Clause.

Both these alternative bases for the decision present a significant impediment to state anti-trust enforcement.

With respect to the first of the grounds of decision, *Federal Baseball Club* v. *National League*, 259 U. S. 200, was decided on the basis that baseball is not interstate commerce. *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356, affirmed the decision "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal anti-trust laws." 346 U. S. at 357.

It is the contention of the State of Illinois that merely because Congress does not choose to regulate a particular business or industry that industry is not to be deemed exempt from state regulation.

Of course it is within the power of Congress to exclude from state regulation any business or industry in interstate commerce, and we interpret the *Toolson* case as impliedly holding that baseball is in interstate commerce.* Furthermore this intent of Congress may be exhibited by its decision to leave the area unregulated. However, we know of no case in which Congressional inaction has been held to preempt an area without strong evidence of that intent. It is respectfully submitted that to allow Congressional inaction to preempt state regulation of a business or industry with no evidence to support it other than Congressional failure to act after this Court has held the business not covered by federal regulation would be a dangerous precedent and a challenge to a state's enforcement of its anti-trust laws with respect to any business or industry not held to be subject to federal regulation.

Generally where the intent of Congress to exclude an area from state regulation has been found, it has been based on the passage of a federal statute which covered the general area but left the specific area unregulated. (See *Bethlehem Co.* v. *State Board,* 330 U. S. 767.)

Congress was recently given the opportunity in S. 950 to exempt professional sports from the ambit of the federal anti-trust laws. Its failure to pass this broad bill is indeed strong evidence of its intent that these areas be governed by some anti-trust regulations.

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* If *Toolson* is not to be so interpreted, the decision of the Wisconsin Supreme Court is completely untenable; a business may not be regulated by a state because it is not regulated by federal law because it is not in interstate commerce.

This Court well described the general rules in this area in *Cloverleaf Co.* v. *Patterson,* 315 U. S. 148, where the Court said at pages 155-156:

> "It has long been recognized that, in those fields of commerce where national uniformity is not essential, either the state or federal government may act. *Willson* v. *Black-bird Creek Marsh Co.,* 2 Pet. 245; *California* v. *Thompson,* 313 U. S. 109, 114. Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application.
>
> When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."

Since these *criteria* of federal preemption have not been met in this case, the failure of Congress to legislate in light of the *Federal Baseball Club* and *Toolson* opinions is not a sufficient basis to prohibit state regulation.

The second alternative basis for the decision of the Wisconsin Supreme Court raises greater dangers for state anti-trust enforcement. The ruling that baseball is an area of interstate commerce which demands uniform regulation to the degree that state regulation is prohibited expands the nature of an exclusion on this basis far beyond the limits imposed by this Court.

Illinois does not contend that the nature of an industry in interstate commerce may not in a proper case preclude state regulation. Indeed where divergent state regulations may make operation of an industry on an interstate basis unfeasible, it is necessary to preclude state action.

The application of this principle to the enforcement of state anti-trust laws which are similar to the operation and effect of the federal law on the same subject is difficult to justify. The Wisconsin Supreme Court recognized that no such reasons presently exist but apparently predicated their opinion on the possibility that different standards could be applied in the future.

Similar reasoning could be applied to restrict the application of state anti-trust laws with respect to any industry or at least any organization in interstate commerce.

It is submitted that a real and present danger of diverse regulation which would make the operation of the industry on an interstate basis impossible on a practical level must be shown before it is held that state regulation is precluded. Here no diverse regulation has been shown nor has it been shown how, if it should exist, it would render impossible the business of baseball. Thus it extends the limits upon state anti-trust regulation to a point far beyond the most restrictive decision of this Court.

In its only decision on the interrelationship of state and federal anti-trust regulation, this Court indicated there was a vast field in which these governmental bodies could operate together. (*Standard Oil Co.* v. *Tennessee*, 217 U. S. 413.) Since the instant decision substantially limits this field, we feel it should be reversed.

In final analysis, the decision of the Wisconsin Supreme Court is predicated on the basis of federal preemption of

the field. In *Florida Avocado Growers* v. *Paul*, 373 U. S. 132, this Court said at page 142:

> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

In the instant case the Wisconsin Supreme Court ruled that preemptions exist both on the basis that Congress so intended and on the basis of the nature of the regulated subject matter. However, persuasive reasons do not exist which dictate that the nature of the subject matter "permits no other conclusion," or that Congress "unmistakably so ordained." Thus the decision constitutes a precedent for an unwarranted limitation of state regulatory powers especially in the anti-trust field and should not be allowed to stand.

CONCLUSION.

For the reasons stated herein, it is the position of the State of Illinois as *Amicus Curiae* that *certiorari* should be granted in the instant case, and the decision of the Wisconsin Supreme Court reversed.

Respectfully submitted,

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